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No. 95-1861

In The

Supreme Court of the United States

October Term, 1995

DANIEL IMMEDIATO; DIANE IMMEDIATO; AND EUGENE IMMEDIATO,

Petitioners,

v.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA; FRANK SPEDAFINO; BEATRICE CERASOLI; ALAN MANOCHERIAN; JANICE K. ANDERSON; LIZ PERELSTEIN; PETER J. MUSTICH,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' REPLY BRIEF

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I. PARENTAL LIBERTY

In its opposition to the Immediato family's petition for a writ of certiorari, respondent Rye Neck School District ("the school district") seeks an iron-clad rule in regard to Fourteenth Amendment parental liberty claims: once a "rational" educational purpose has been established for a program, then parents and students have no recourse but to abide by the edicts of the officials or suffer the consequences. *See* Respondents' Opposition ("Respondents' Opp.") at 5-6, 17. Adoption of rational basis review for parental liberty claims would virtually eliminate the ability of parents to challenge public educational programs that violate their right to direct their children's education. Moreover, such a standard contradicts the special place of the family and parents under the Constitution.

The Immediatos, a family challenging the ability of the school district to conscript their son to volunteer, set forth in their petition the uncertainty in the law and conflicts in the courts concerning the nature of parental liberty rights under the Fourteenth Amendment. Petition at 9-12. They further document that while the law may currently be uncertain, this Nation's history and traditions demand that the right of parents to direct the upbringing and education of their children be affirmed as fundamental. *Id.* at 12-18.

The school district assiduously avoids addressing the primary issue in the instant case: whether the right of parents to direct the education of their children is a fundamental or a non-fundamental right. Perhaps the school district recognized that it would be difficult to counter the overwhelming evidence from history and case law recognizing parental right as one of the primary foundations of our society. Instead, the school district devotes almost its entire opposition brief to one of the most time-honored arguments against the assertion of parental rights in the public school setting. An acceptance of petitioners' argument, it claims, would open up a

Pandora's Box of unlimited parental and court meddling, thereby paralyzing the ability of public schools to determine their policies.

Not only are such arguments alarmist and hyperbolic, they evade the central question in the Immediatos' petition: is their right to direct their son Daniel's education a fundamental right? Government officials can violate parental rights in myriad ways, whether through overly intrusive regulation of private or home schooling, or through public school programs that usurp authority from parents in areas traditionally left to family decision-making. The school district attempts to avoid these issues by narrowing the issue to whether parents can challenge public school curriculum choices. Respondents' Opp. at 6-8. The school district cites a conflicting body of case law in support of its argument that parental rights have never been and cannot be protected in the public school setting. However, the primary cases upon which the school district relies involve either home schooling or private schools, not public education disputes.[1]

The primary issue in all recent parental liberty cases, whether they involve home schooling, private schools, or

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[1] For instance, *Runyon v. McCrary*, 427 U.S. 160 (1976), the main case relied upon by the school district for its contention that parents cannot challenge a public school program, did not involve public education at all. Rather, it involved whether parents had a "constitutional right to provide their children with *private* education unfettered by reasonable government regulation." *Id.* at 178 (emphasis added); *see also Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (addressing right of parents to homeschool child without *any* government regulation); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 135 (N.D.N.Y. 1988) (challenge by home schooling parent to state regulation). Of course, petitioners, unlike the parents in *Runyon*, *Murphy*, and *Blackwelder* do not argue that the government can play no role in the education of their children, but rather challenge an overextension of public school authority into family matters.

public education, is the proper characterization of parental liberty rights, an issue upon which there is no clear guidance from this Court. *See* Petition 9-12. It is this issue that must be resolved before turning to the question of how parental liberty rights should be construed in the public school setting.[2]

As set forth in the petition (at 6-9), public schools have recently become enmeshed in areas traditionally left to parental authority, and numerous, albeit conflicting, decisions have been handed down in the past several years construing parental rights in the public schools. *See also* Rutherford Institute ("Rutherford Inst.") *Amicus* Brief in Support of Petition at 9-10.[3] The Immediatos recognize

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[2] Indeed, it is at this point somewhat premature to address the standards and tests that should be used when parents argue that public school programs violate their right to direct their children's education. First, this Court must decide whether parents even have a fundamental right to direct their children's education, whether it be at home, in a private school, or in the public schools. Petitioners set forth some of the issues concerning public school disputes in order to counter the mischaracterizations made by the court below and the school district. *See* Petition at 20-24.

[3] In its discussion of recent cases that involve parental rights in the public school setting, the school district blatantly mischaracterizes their rulings, claiming that both cases involve issues outside of educational policy. *See, e.g., Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (1995), *cert. denied*, 1116 S.Ct. 753 (1996) and *Alfonzo v. Fernandez*, 606 N.Y.S.2d 259 (1993), *appeal dismissed without op.*, 614 N.Y.S.2d 388 (1994); Respondents' Opp. at 11, 15. However, the courts in these cases made clear that they were reviewing the condom distribution programs as part of a public school educational program, not, as the school district contends, as a "health" policy. *See Curtis*, 652 N.E.2d at 584; *Alfonzo*, 606 N.Y.S. at 265-67. Both condom distribution programs and mandatory service programs represent instances of public schools going further than they have ever gone in the past, intruding into areas traditionally left

that public schools normally have discretion to determine their curriculum, and in no way wish to interfere with the ability of public schools to impart necessary skills and knowledge to their children or any others. Accordingly, the test set forth by the Immediatos for protecting parental rights in the public school setting provides a workable balance between public school authority and parental rights.

The school district misstates these threshold issues and claims that mere recognition of parental rights in the public schools would subject each and every aspect of the public school curriculum to strict scrutiny review. Respondents' Opp. 8. However, as set forth in the petition, before a court would even adopt strict scrutiny to mandatory service programs or any other public school requirement, parents must demonstrate that the program violates their right to direct their children's education. Petition at 20-24. First, parents would have to demonstrate that a program was coercive. Secondly, to violate parental liberty, a program would have to force young people to perform actions and participate in programs as opposed to merely exposing them to objectionable values and beliefs. Lastly, parents would have to demonstrate, as required under the common law, that the program from which the student would be exempt was not an essential of good citizenship and that the exemption would not interfere with the administration of the public schools. Only after parents meet these threshold requirements

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to parental authority. Furthermore, both programs have little connection to the traditional school curriculum; most condom distribution programs have some relation to the school's interest in health education while the school district's service program has a tenuous connection to the class, "Managing Your Future." *See* Petition at 3. The school district's program should be analyzed under the parental liberty standards set forth in *Curtis*, *Alfonzo*, and other cases involving intrusions by public schools into family autonomy.

would strict scrutiny and a narrow tailoring test apply to parental liberty claims.

The school district asserts that both the coercion requirement and the exposure/action rule provide no limit on parental rights claims in the public schools. As the Supreme Judicial Court of Massachusetts recognized in *Curtis*, however, the coercion requirement plays an important role in determining whether public school authority violates parental rights. Under the rule, only school programs that provide no outlet for parents and result in a sanction or expulsion violate parental rights. *Id.*, 652 N.E.2d at 586.

After declaring the coercion requirement unworkable, the school district then marches out a typical "parade of horribles," claiming that if petitioners' arguments were accepted, students could opt out of any educational requirement, including English and math classes. Respondents' Opp. at 8-9. It would be quite difficult to conjure up a sincere, values-based parental objection to the traditional public school curriculum. Nevertheless, even assuming that a parent would object and file a lawsuit over their child learning how to read or perform math problems, the school district ignores the common law rules for parental liberty claims in the public schools: students cannot be exempt from "the essentials of good citizenship" and the exemption cannot interfere with the administration of the public schools. These important limiting factors would make it extremely difficult for parents to successfully challenge educational basics.

Similar alarmism pervades the school district's discussion of the "exposure/action" rule. In the same manner the school district expands the definition of "curriculum" to the breaking point, so too does it attempt to expand the definition of action to include virtually anything undertaken by students. Even the court in *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1064-65 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988), however, distinguished between traditional classroom activity such

as reading books and test taking (which were acceptable) and true "acts," such as participating in a school play (which were not). *See* Petition at 21-23. Moreover, the school district admits that the exposure/action test is employed regularly in free exercise cases apparently without destroying the public schools or interfering with other governmental policies. *See* Respondents' Opp. at 15. When distinguished from the absurd examples provided by the school district, the exposure/action rule is an important mechanism to ensure protection of parental liberty in the public schools, while still allowing school officials to further their educational interests.[4]

In addition to mischaracterizing the legal standards in the instant case, the school district throughout its opposition paints a picture of parents that has little relation to the vast majority of parents whose children attend public schools. If the school district were to be believed, parents are forever waiting to find some excuse to deny their children the opportunity to learn, and consequently run to court to challenge every public school program. This caricature of parenting is unfair and irresponsible. As noted in the Immediatos' petition (at 6-9, A-64-69) and the Rutherford Institute's *Amicus* Brief (9-10), current values disputes between parents and public schools arise primarily because many school officials insist on

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[4] The Immediatos also documented in their petition the fact that common law decisions recognized the rights of parents in the public school setting, and, indeed, these early decisions served as a basis for this Court's landmark trilogy of parental liberty decisions in the 1920s. Petition at 16-17. These decisions and subsequent cases enforcing parental rights contradict the school district's assertion that the remedy sought by petitioners is unprecedented. The remedy sought by the Immediatos and other parents is nothing more than the recognition of their long-standing rights at a time when such rights are under attack by educational officials throughout the nation. *See* Petition at 6-9; Rutherford Inst. *Amicus* Brief at 9-10.

assuming responsibilities that have traditionally been left to parents. It is therefore imperative that parental rights be preserved in the public school setting.

The school district also does not address the alternative to affirming parental rights as fundamental: relegating this right to non-fundamental status. The school district argues that if educational programs usurp parental authority, school officials need only point to a "rational" educational objective for the program to be sustained. Respondents' Opp. at 17. As set forth in the petition (at 18-19), adoption of rational basis review for parental liberty claims will leave parents with no recourse. Public school officials, under rational basis review, can adopt virtually any requirement, and parents cannot object so long as the school district can point to a reasonable educational objective for the program. The primacy of the family under our system of law simply does not allow such an incredibly deferential standard when public school programs intrude into family matters.

The Second Circuit below declared that in the interest of judicial self-restraint, it would not "break new ground" by recognizing parental liberty as a fundamental constitutional right. *Immediato v. Rye Neck School District*, 73 F.3d 454, 461 (2d Cir. 1996). In fact, the court had it exactly backward: the school district in the instant case, like a growing number of school districts, has broken new ground by intruding into the private realm of the family. The Immediatos seek only to restore a right central to our Nation's history and traditions – the right of parents to have primary responsibility over the education of their children. Accordingly, the Immediatos urge this Court to grant their petition in order to determine whether parental liberty rights will be enforceable in modern educational disputes.

II. PERSONAL LIBERTY

The school district misstates petitioners' Fourteenth Amendment personal liberty claim, suggesting that it

attempts to "create a blanket liberty interest shielding students from any activities with which students or their parents disagree. . . . " Respondents' Opp. at 19. Petitioners do not seek such broad and open-ended relief. Rather, they seek only to limit the ability of the school district to mandate volunteering, an activity that until the imposition of mandatory service requirements had always been left to individual and family decision-making. Petition at 25-29.

Nowhere does the school district attempt to respond to petitioners' argument concerning the centrality of voluntary charity to this Nation's history and traditions. The school district correctly cites *Meyer v. Nebraska*, 262 U.S. 390 (1923), as establishing parameters for recognizing what liberties are protected under the Fourteenth Amendment, but it ignores *Meyer*'s crucial holding that the amendment protects those "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. As the Immediatos set forth in their petition, perhaps no privilege or liberty is more deeply embedded in the common law and in our traditions than that of individuals deciding whether and under what circumstances to perform acts of charity. Petition at 25-29; *see also* Rutherford Inst. *Amicus* Brief at 6-7. Such liberties cannot be usurped by coercive public school programs that require students to serve others in a manner prescribed by school officials.

The school district also incredibly asserts that because compulsory education laws have been held to be constitutional, it can *ipso facto* require students to perform charitable service to others. Respondents' Opp. at 17. In so doing, the school district refuses to recognize any constitutional limitation on the power of public school officials to mandate certain activities in the name of education.

One of the Fourteenth Amendment liberties listed in the *Meyer* opinion demonstrates the indefensible nature of the school district's position. This Court held in *Meyer*

that individuals have a Fourteenth Amendment right to "engage in the common occupations of life," in effect, a right to seek employment. Given this guarantee, could public schools require students as a condition of graduation to obtain out-of-school employment? Such a requirement could easily be justified as a "reasonable" educational program that fostered responsibility and imparted good work skills to young people. Of course, the school district justifies its program on exactly the same grounds. Respondents' Brief at 1-3; Petition at A-50. Nevertheless, a program of forced employment would doubtless be struck down as overextending public school authority by requiring an activity – employment – that has traditionally been left to individuals and, if the individual is a minor, to families.

Moreover, the Immediatos do not challenge the school district's program on the grounds that it is a particularly onerous or burdensome requirement. *See* Respondents' Opp. at 18. They challenge this unique and novel requirement because it mandates an activity that under the common law and the legal traditions of our country must be left to individual conscience and belief.

Public schools can under the Constitution require students to gain certain necessary skills and acquire useful knowledge. However, public schools cannot require students to do anything school officials think may be good for them. Even more importantly, they cannot require students to perform an activity like volunteering that must spring from self-motivation and inspiration, not from a state-imposed obligation. This Court should accept the Immediatos' petition in order to restore the right of individuals to determine whether and under what circumstances they will perform service to others.

CONCLUSION

The decision to perform charitable work through service to others must be between an individual and his or her conscience, not between the individual and the State. The school district should not be allowed to eviscerate this fundamental principle of our constitutional republic in pursuit of educational goals, no matter how laudable the purpose. This Court should grant the Immediatos' petition in order to determine the respective boundaries of public school authority and the rights of families.

Respectfully submitted,

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